SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States.

October Term, 1967
No. 47

SAM GINSBERG,

Appellant,

vs.

THE STATE OF NEW YORK,

Appellee.

On Appeal to the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

CHARLES H. KEATING, JR.,
3300 Carew Tower,
Cincinnati, Ohio 45202,

JAMES J. CLANCY,
9055 La Tuna Canyon Road,
Sun Valley, Calif. 91352,

RAY T. DREHER,
111 South Bemiston Avenue,
Clayton, Missouri 63105,

Counsel for Amicus Curiae.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience amicus curiae is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with

a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our Nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our Nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the Nation's basic obscenity laws.

Sam Ginsberg v. The State of New York, is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the Nation.

Statement of the Case.

Appellant Sam Ginsberg is the owner of a candy, stationery and luncheonette establishment at 1507 Bellmore Avenue, North Bellmore, Nassau County, New York [R. 156]. The store which he had owned since January 1964 and had operated with the help of his wife is approximately 30 feet deep and 12 feet wide [R. 73, 156, 157, Deft. Ex. C] and was the sole source of appellant's income [R. 157]. In his business he also sold newspapers and 175 to 200 types of magazines [R. 157]. Photographs of the inside of his shop, and of his magazines rack are attached hereto as Appendix A, being copies of Defendant's Exhibits A through D, and people's Exhibit 1.

On October 27, 1965, an information in two counts was filed in the District Court of Nassau County against John Doe, A/K/A Sam c/o Sam's Stationery, 1507 Bellmore Avenue, Bellmore, New York, sup-

ported by the affidavit of Richard Lance Corey, aged 16 and his mother Mary Corey, alleging that the defendant had on October 18, 1965, sold Richard Lance Corey, aged 16, two magazines known as "Mr. Annual" and "Sir", in violation of Section 484(h) of the Penal Law of the State of New York. Count 1 named the two magazines and charged a violation of subsection 2(a) and Count 2 named the same magazines and charged a violation of subsection 2(b) [R. 2, 3, 4]. On October 28, 1965, a second information in two counts was filed in the same court against Sam Ginsberg [R. 48], supported by the affidavit of detective Albert Anderson, attached to the Vice Squad, Nassau County Police Department, alleging that the defendant had on October 26, 1965, sold Richard Lance Corey, aged 16, two magazines known as "Man to Man" and "Escapade", in violation of Section 484(h) of the Penal Law of the State of New York. Count 1 named the two magazines and charged a violation of subsection 2(a) and count 2 named the same two magazines and charged a violation of subsection 2(b) [R. 4, 5]. Photographs of the covers of the four magazines are attached hereto as Appendix A, being copies of the covers of People's Exhibits 1-4.

The case came on for trial on April 18, 19, and 20, 1966, before District Court Judge Julius Chinman, sitting without a jury.

People of the State of New York: Case in Chief.

Richard Lance Corey testified for the state, that on October 18, 1965, and on October 26, 1965, he was 16 years of age and a student in the 11th grade at Mepham High School [R. 20, 36]. He said that at about six or seven p.m., on October 18, 1965, he visited Sam's

Luncheonette and Stationery Store on Bellmore Avenue in North Bellmore, where he purchased two magazines, "Sir" and "Mr. Annual" [R. 24, 26]. When he walked into the shop he said, "Hi" to Sam, whom he knew pretty well [R. 22]. He had been in that shop a total of about 50 times [R. 21]. At the time of the purchase Mr. Ginsberg was behind the store counter [R. 28]. He picked up the magazines, "Sir" and "Escapade" from the magazine rack which was directly across and at an angle from the counter and went up to Mr. Ginsberg who came to the end of the counter [R. 28]. He held the two magazines in his left hand in an off-center fashion so that the prices of each magazine showed, and asked Mr. Ginsberg how much they cost [R. 30]. He said that Mr. Ginsberg looked down at the magazines and told him the price [R. 29]. He had about $2.00 with him [R. 24]. He pulled the dollar bills out of his back pocket and gave them to Mr. Ginsberg and received the change [R. 28, 29]. He identified Mr. Ginsberg in the courtroom as the one who had sold him the magazines [R. 30]. When he left the store he gave the magazines to his father who was waiting for him outside [R. 31]. He identified his initials "R. C." on the magazines and said he put them on the same day that he purchased them, as he had been instructed to by the detective [R. 26]. The magazines "Sir" and "Mr. Annual" were identified and received in evidence as People's Exhibit 2 and People's Exhibit 3. A photograph of the magazine rack marked People's Exhibit 1 was received in evidence [R. 23].

Richard Corey testified that on October 26th at about 4:00 p.m., he returned to Sam's where he purchased two more magazines, "Escapade" and "Man to Man". With him at this time were two detectives, one of whom

was Detective Anderson. One detective preceded him into the shop and was sitting at the counter, having coffee, when he entered. As he was giving the money to Sam for the magazines he purchased on that date, the other, Detective Anderson, came in and asked for a package of cigarettes [R. 33, 34]. On that occasion he picked up "Escapade" and "Man to Man" from the rack and approached Sam, who was at the end of the counter. When he was two feet from him, he said, "Hello" and "How much?", which was the extent of their conversation. He said he gave him $2.00 at the most and got change [R. 34, 35]. Thereafter he walked outside, placed his initials on the purchases and gave them to Detective Anderson [R. 36]. He identified his initials "R.C." on "Escapade" and "Man to Man", which were marked as People's Exhibits 4 and 5 and received into evidence [R. 37].

On cross-examination by defense attorney Morris J. Ezra, witness Corey testified that he lived about a mile south of Sam's store and that he went into Sam's store for the first time in July of 1965 because his girl friend, whom he met in July, lived a block away. He had stopped in on the way to her house [R. 43, 44, 46]. Asked if they had "Man to Man" or "Escapade" in the public library, he answered, "No, sir". Asked if he ever saw any books on architecture of synagogue anywhere in the library, he answered, "No, but they probably have some" [R. 48]. When asked by the Court if he had purchased these kinds of magazines before, he said, "Yes" he had purchased other magazines at Sam's, and that his mother had seen them. As a result of subsequent conversations with his mother and father, it had been arranged for him to go in and buy these magazines with his father outside [R. 49,

63]. Asked by defense counsel whether his father told him to go and buy these magazines from this particular store, he said, "Not these exact magazines. He said, 'Go in there and get some juicy magazines.'" [R. 48]. His mother called the detectives the day after the purchase. He stated that he had purchased magazines of this kind elsewhere. [R. 47]. Asked where Mr. Ginsberg was at the time of the October 26th purchase, he indicated by an "X", the opening between the food counter and the gum counter, as shown on a photograph of the inside of the shop, which was thereafter introduced into evidence as Defendant's Exhibit A. He marked the position he occupied with the initials "R.C." [R. 60, 61]. Defendant's Exhibit B, a photograph of the inside of the shop taken from behind the counter and showing the magazine rack was received into evidence [R. 63].

On re-direct examination, by Assistant District Attorney Robert Rivers, witness Richard Corey testified that prior to his making the first purchase on October 18th with his father, his mother had gone down to the store and talked to Sam [R. 68]. Mr. Ginsberg's manner of talking to his mother had made him mad and so, on or about October 11 or 12, which was a day or two after his mother had visited the store, he had a conversation with Mr. Ginsberg. He said, "I visited him to take the magazines behind the rack or at least put them behind the counter. At least this way he wouldn't get in trouble with the law. He started telling me it wasn't my business. He started telling me a story about Adam and Eve. My girl friend was sitting right next to me when he was telling me this. . . . I told him I'm not exactly what I said. But, I know I said something about my age being 16 because my

mother was there a couple of days before. . . ." [R. 64, 65].

On re-cross-examination by defense attorney Ezra he stated he had an idea that there was a law about selling magazines of this type to persons of a certain age, but that he wasn't sure what age. He said that he had learned this during attempts to purchase magazines of this kind from other store owners, who sometimes would ask him how old he was [R. 70].

Mary Corey, testified for the state that she was the mother of Richard Lance Corey and that he was born on September 11, 1949, and was 16 years and 1 month on the date of the purchase on October 18th. She identified Mr. Ginsberg in the courtroom as the person with whom she had a conversation in October of 1965, at Sam's Luncheonette [R. 71]. At that time she approached Mr. Ginsberg with her 6-year old son and said, "I want to compliment you on your wide range of pornography." When Mr. Ginsberg asked her who she was, she said, "I am Lance Corey's mother. . . . You sold my son magazines when he was still 15 years old. He just turned 16 a few weeks ago. . . . You have these out in the open. You would probably even sell them to my child, my 6-year old child here with me." She then stated that Mr. Ginsberg said, it has nothing to do with me, that it was no concern of his how old anyone is, if he wants to buy a magazine, he may purchase it [R. 73, 74]. After this conversation she returned home and called the Seventh Precinct [R. 75]. She stated that on October 18th, her husband and son came home with two magazines [R. 75] and thereafter on October 26th, she accompanied her son, Detectives Anderson and Sgt. Groh on another visit to the store.

She remained outside in the car and observed her son come out with two magazines, identified by her as Exhibits 4 and 5, which were initialed by her son in her presence and turned over to the detective [R. 76, 77].

Asked on cross-examination by defense attorney Ezra if Mr. Ginsberg did not ask her, "Who is your son?" she replied, "He knew my son by the name Lance". Asked if she did not say to Mr. Ginsberg, "You know my son Lance, why did you sell him these?" she replied, "I did not ask him 'Why'. I said, you sold my son Lance these filthy magazines when he was still 15 years old. He just turned 16 a few weeks ago." [R. 78, 79]. The Court sustained objections to questions regarding the witness' opinion as to whether other materials were offensive to her taste, but indicated he would permit questions regarding her opinion as to the magazines in question [R. 85]. Defense counsel replied: "Your Honor, I won't go into the question of these things."

Detective Groh testified for the state that he was a member of the Nassau County Police Department and had been for 13 years, being currently assigned to the investigation of gambling, vice, and pornography [R. 88]. In the course of his duties he had gone to Mr. Ginsberg's place of business in a car with Detective Anderson, Richard Corey and Mrs. Corey and was seated at the counter when Richard Corey came into the store [R. 89]. He heard Mr. Ginsberg say, "Hello, Lance" and saw Richard Corey go over to the magazine rack where he looked through the magazines for three to four minutes. Lance then picked up a couple of magazines, went over to Mr. Ginsberg, held the magazines in one hand, spread somewhat like the cards in a

poker hand, and gave him some money and Mr. Ginsberg gave Lance some change. At this time he was 15 to 20 feet away. As Lance was paying Mr. Ginsberg, Detective Anderson came in and stood alongside of him. Then Lance walked out and two or three minutes later he also walked out [R. 90]. Thereafter they met in the car where Lance initialed the magazines and he took custody of them. He identified Exhibits 4 and 5 as the magazines which he saw Richard Corey purchase [R. 91, 92].

On cross-examination by defense attorney Ezra, Detective Groh testified that there was no one other than the defendant working in the store that he could see [R. 94]. The Court sustained an objection to the introduction, through the witness, of defendant's Exhibit C for identification when the witness stated it did not appear to be a fair representation. The Court noted that the picture was taken with a short-focus lens and appeared to have a great deal of distortion [R. 95, 97]. The witness testified that the magazine rack was on the left side of the store as one entered and about 6 to 8 feet from the front and approximately 10 to 15 feet from where he sat at the counter [R. 98-99]. He could hear conversation, but he could not make out what they were saying [R. 101]. He saw Lance give Mr. Ginsberg two $1.00 bills and hold the magazines in two hands, indicating the manner [R. 102].

The People of the State of New York rested their case.

The defense attorney moved to dismiss on various grounds and renewed all pre-trial motions, which were denied by the Court.

Sam Ginsberg: The Defense.

Allen M. Hannington testified that he had been a photographer since 1939 and had been employed as such by Drennan Photos Inc., Mineola, N.Y., and took photographs of Mr. Ginsberg's shop in the course of his employment [R. 121]. Defendant's Exhibit C, a photograph taken at the rear of the shop looking toward the front and Defendant's Exhibit D, a photograph taken at the rear of the shop depicting a food case, cash register, mixing machines, coffee urns and cigarette display, were received in evidence [R. 128, 131].

Reverend George L. S. Stowell, testified for the defense that he was the pastor at St. Marks Episcopal Church in North Bellmore [R. 135]. He had come to know the defendant and his wife well in the two years that he had conducted the store [R. 137]. He said that he visited the defendant's store twice a day to get the morning and afternoon papers and other small items and had taken the young people of the church there for lunch [R. 136]. He stated he had discussed Mr. Ginsberg with others in the community and they had said his reputation for honesty, virtue and truthfulness was good [R. 139].

On cross-examination by Assistant District Attorney Rivers Father Stowell testified he was a married Episcopal priest. Shown Exhibits 3 and 4 he said he did not know that Mr. Ginsberg exhibited such magazines for sale. Asked if he knew that it was alleged that the defendant sold such material to a 16-year-old, he said he had heard so last night for the first time [R. 141, 142]. He stated that if investigation showed that Sam had taken the initiative of selling pictures like that to 15 and 16-year olds, he would take a dif-

ferent opinion of him [R. 143]. Shown page 57 on People's Exhibit 4, he stated that he considered a picture of this kind would encourage the immoral attitudes or prurient interest of over half the young people under 17. He considered that such a picture would be patently offensive to prevailing standards in the adult community as a whole with respect to what was suitable material for minors [R. 144]. Shown page 51 of People's Exhibit 5 by the Court, he stated that such a picture had no social value for children under 17 years of age, encouraged them to occasions of sin, offered no help in their biological education, and had a degrading influence on them [R. 145]. Asked if his opinion as to the defendant's reputation would be different if, when confronted by the parent whose 16-year old son had been sold these magazines, and her 6-year old son, the defendant was heard to say, "I'll sell them to anyone", and when asked whether or not "anyone" meant the 6 year old, the defendant was heard to say, "Anyone", he answered, "Well, I wouldn't make any statement as to his reputation" [R. 146].

On re-direct examination by defense attorney Ezra, the Court sustained an objection to questions regarding the social importance to minors under the age of 17 of pictures not in evidence. The Court stated that the issue was whether the sale of Exhibits 2, 3, 4 and 5 was in violation of Section 484(h) [R. 147, 148] and that what is published in another magazine has nothing to do with the issue in this case [R. 149]. Page 9 of Section 2 of the New York Times of March 27, 1966, was marked, Defendant's Exhibit E for identification, but was not admitted into evidence [R. 153].

Sam Ginsberg, the defendant, testified that he had owned and he and his wife had operated a candy store, stationery and luncheonette establishment at 1507 Bellmore for two years and four months and that it was his sole source of income. In this business he sold 175 to 200 magazines, which he purchased from G. N. S. News Company in Long Island, which was the only supplier of magazines in the area [R. 157, 160]. Twice a week, the magazines were sent in automatically and he had no choice in their selection [R. 158]. When the Court noted that other stationery stores in the area were offering magazines and yet had no girlie magazines on their shelves, the defense attorney commented that the Court did not know whether or not they had them behind the counter [R. 161]. Mr. Ginsberg stated that the first time he knew the witness Corey as Lance Corey was when he was served with the summons [R. 162]. He denied that he sold the books "Sir" and "Mr. Annual" to Corey on October 18th and denied selling him any book of that nature prior to October 18th. He also denied having a conversation with him regarding the removal of that type of book from the rack to behind the counter [R. 163]. He stated that he saw Richard Lance Corey come into his shop on October 26, 1965, between 5:00 anad 5:30 and at that time he was behind the counter and the detective was sitting at the counter with a cup of coffee [R. 164]. He stated that Corey selected his magazines, walked over between the gum counter and candy counter with the magazines folded under his right armpit and said, "Its $1.20, Sam". Corey gave him the exact change and by the time he came back and put the money in the register he was gone. He was not able to see the name or type of the magazines that he had

chosen, and he could not remember whether Corey mentioned the number of magazines or not [R. 165, 166]. Asked by the Court the price of his magazines, he stated they ran from 12¢ to $1.75. Asked if a customer took a magazine that sells for $1.75 and gave him 60¢ for it, if he would not be losing money, he answered, "yes". He stated that his customers were very honorable and that his inventories had shown that they never had taken a $1.75 magazine and given him 60¢. He said he had nice people there and that no one ever stole magazines or candy from his counter [R. 168]. He stated that he did not inquire of his regular customers what they took and that "It would be more embarrassing to ask them or question them" [R. 169]. He stated that while Richard Corey came in quite a number of times, he could not remember him every buying a magazine prior to October 26th and that on that date, when he said, "Here's a dollary twenty, Sam," he took his word for it [R. 170, 171]. On Defendant's Exhibit A, he indicated by an "S" where Richard Corey was standing when he gave him the money [R. 174]. He stated that Mrs. Corey came into his shop several days before October 26th and said, "I don't want you to sell any of these books to my son." and that he responded, "I don't know who your son is, Ma'am". At that time he didn't know her name or that of her son. He heard sounds of a discussion with his wife, but nothing more. She was by herself. He got busy and walked away. When he returned she was gone [R. 179].

On cross-examination by Assistant District Attorney Rivers, he stated that the magazines which were under Corey's armpit were practically together but it could be

seen that there were two magazines [R. 185]. He stated that he was aware of the contents of "Escapade", "Sir", "Man to Man" and "Mr. Annual", that "Escapade" contains stories, photos of girls in nude fashion and in different types of dress, and pictures of females with the entire breasts and buttocks exposed [R. 186]. He stated that in the ordering of magazines from G.N.S. he received a slip indicating the number of magazines and the price thereof which was checked before he put the magazine on the racks [R. 191, 194]. He stated that there were times when he inquired the age of the persons purchasing the girlie magazines—when he had the time and was not that busy. Asked how he would know what type of magazine Richard Corey was buying since his testimony was that the magazines were under his armpit, he said, "He could have had anything" [R. 198]. He denied making the statement attributed to him in Mrs. Corey's testimony. He stated he did not recall what his wife said to Mrs. Corey as he was quite busy [R. 204]. He recalled Richard Corey coming into the store with his girl friend but denied having any conversation with the boy regarding removal of the book or "Adam and Eve" [R. 205]. Asked what age group he felt Lance Corey fell into he said "The way he is dressed at times, he could be 17 or 18 or he could be 15 [R. 207].

During re-direct examination by defense attorney the Court called his attention to People's Exhibit 1 and the third column of Magazines from the right headed by "Escapade" and the titles, "Millionaire", "Man to Man", "Topper", "Gem", "Men's Digest", "Jaguar" and "Gent" and asked if in the process of putting them in the rack or taking them out of the rack he did not be-

come aware of the contents so that he could designate them as girlie magazines which contained pictures of bare breasts and bare buttocks, he answered, yes [R. 210].

Mrs. Pauline Ginsberg testified for the defense that she was the wife of the defendant Sam Ginsberg and the mother of his three children. She stated that she worked at the store most of the day and was present and vaguely recalled an instance when a woman came into the store and spoke to her husband about her son and magazines [R. 214]. She stated she was behind the counter and heard this woman shouting something about magazines at her husband. She did not hear too clearly what her husband said but did hear him say, "Who is your son, and who are you?" She testified she never heard her husband say, "I don't care how old he is. If he wants to buy magazines, he can buy them." She stated she walked over and asked, "Is there anything I can do to help you", whereupon the woman started to rave on about certain magazines. When she asked her, "Which magazines are you referring to" and "Who is your son" the woman replied, "Oh, you know what I'm talking about and stormed out of the store." [R. 215].

On cross-examination by Assistant District Attorney Rivers, Mrs. Ginsberg stated that at the time of the shouting her husband was about two to three feet away from the lady and that she herself was busy waiting on customers [R. 218-219]. She stated that she could not hear too clearly what her husband said to this lady but that she would have heard him say, "I don't care how old your son is. If he wants to buy magazines, he can buy them." but that "he did not say that". "He cannot say that." [R. 221].

She said she very rarely engaged in the sale of magazines and never had occasion to sell the magazines "Escapade", "Man to Man", "Mr. Annual" and "Sir" and had never observed them [R. 224]. She stated that she did not know who Mary Corey was [R. 225], nor did she or her husband attempt to hire Lance Corey as an employee [R. 228], nor did she tell Mrs. Corey when she was in the store yelling at her husband that if she took care of her own son and brought him up correctly, he would not buy such magazines [R. 227].

The defendant rested his case.

The People of the State of New York: Rebuttal.

Detective Anderson testified for the state in rebuttal, that he was a member of the Nassau County Police Department and had been for 13 years and in his capacity as a member of the Vice Squad visited Sam's Luncheonette on October 26, 1965 [R. 229]. He arrived there at about 5:10 in a patrol car in the company of Sgt. Groh, Mrs. Corey and Richard Corey. Sgt. Groh entered the premises at about 5:10 p.m. Richard Corey entered at approximately 5:14 and he entered at approximately 5:15. When he entered he stook directly next to Richard Corey [R. 230] who was standing at the entrance of the soda fountain speaking to Mr. Ginsberg. Sgt. Groh was seated at the soda fountain about 10 feet from Mr. Ginsberg. He identified Exhibit 4 as the magazine which Lance Corey had in his hand at the time and whose cover was visible. He saw Richard Corey hand currency to Mr. Ginsberg, who went to the cash register and returned with change for the boy. Thereafter the boy left [R. 231]. He followed the boy out. He placed his initials on the two magazines which Richard Corey gave him and he

had Richard Corey initial the magazines also. He identified Exhibit 5 as the second magazine purchased by Richard Corey [R. 232].

On cross-examination by defense attorney Ezra, Detective Anderson demonstrated how Richard Corey held the magazine when he was at the counter and the Court noted for the record that the front of the magazine was visible to anybody standing in front of that person [R. 235]. Asked by the Court how close he was to Richard Corey, he said a foot away [R. 239]. He also stated that he did not see Richard Corey place a magazine or magazines folded under his right arm nor did People's Exhibit 4 have any crease marks [R. 240].

The people rested and the defendant rested. The defendant moved to dismiss and renewed all pre-trial motions. After oral argument, the Court on April 20, 1966, made the following findings [R. 248-249]:

> "I find that the People have proved beyond a reasonable doubt that Richard Lance Corey on October 18, 1965, and October 26, 1965, was 16 years of age. That the defendant knew or had reason to know that Richard Lance Corey was under 17 years of age. That People's Exhibits 2, 3, 4 and 5 contained pictures and photographs depicting female nudities as defined by the aforesaid section. Further that People's Exhibit 5 and People's Exhibit 3 contained verbal descriptions and narrative accounts of sexual excitement and sexual conduct.
>
> "I find that the material as above set forth is harmful to minors in that I find that these photographs and articles are accounts which predominantly appeal to the prurient, shameful and morbid interest of minors and that in considering the

adult community as a whole, is wholly unsuitable material for minors under 17 years of age.

"I further find that Richard Lance Corey purchased People's Exhibits 2, 3, 4 and 5 from the defendant Sam Ginsberg and paid a monetary consideration therefor.

"I find that the defendant Sam Ginsberg knew the character and contents of People's Exhibits 2, 3, 4 and 5.

"I further find that the defendant Sam Ginsberg knew that Richard Lance Corey purchased these specific magazines in evidence in these cases as People's Exhibits 2, 3, 4 and 5.

"I therefore find that the defendant Sam Ginsberg is guilty of both counts of the charges set forth in CR3119 and guilty of both counts of the charges set forth in CR3125."

The trial court on May 17, 1966, suspended sentence on both counts.

On January 20, the Appellate Term of the Supreme Court of the State of New York, Second Judicial Department affirmed the judgments on both counts [R. 257] and on January 30, amended the judgments to indicate that the Court had considered the two constitutional questions which were raised, *i.e.*, freedom of the press, and vagueness and uncertainty, and had held the statute not repugnant to the United States Constitution on either ground [R. 261].

On January 24, 1967, Associate Justice John F. Scileppi denied defendant's petition for leave to appeal to that court [R. 262].

Summary of Argument.

I.

New York Penal Law Section 484(h), enacted in 1965, was designed to ameliorate the condition which existed because of the interpretation given to Penal Law Section 1141, *i.e.,* that that section proscribed "hard-core" pornography only. Although the statute uses the phrase "harmful to minors", the New York Court of Appeals has interpreted it to mean "obscene to minors" and the statute to employ variable obscenity concepts. This Court is bound by the state court's interpretation.

The issue that the terminology used here, "harmful to minors" is vague and proscribes material protected by the 1st Amendment was the same issue raised in *Mishkin v. New York* regarding the terms "sadistic" and "masochistic." In *Mishkin,* this Court held that it was bound by the state courts ruling that such words were synonymous with "obscene" and that there was no issue involved as to whether the word obscene was vague or offended the first amendment guarantees, having been decided in *Roth-Alberts.*

Similarly, the court held in *Mishkin* that the prurient appeal of the *Roth* rule could be tested in relation to a well defined class (sado-masochist) where it was clear from the nature of the materials that it was aimed at such audience. It is difficult to understand, in this parallel situation, how the principles expressed in that case, may not be considered to govern the issues in this case.

Since *Mishkin* involved the crimes of "publishing" and "possession for sale," the probable recipient audience was of necessity identified from an examination of the material. When however the materials are sold

directly to the special class, the only question is, "Do they appeal to the prurient interest of the special class?"

Contrary to the claim made by appellant, neither the Model Penal Code, nor New York Penal Law Section 235 (based upon the Model Penal Code and effective Sept. 1, 1967) supports his claim that the materal *itself* must be designed for "persons under 17." The requirements of those sections are stated in the alternative and mere proof that the subject matter was actually disseminated to a member of the special class of children would invoke the special rule.

Judge Learned Hand is the architect of variable obscenity—that principle appears throughout his obscenity opinions. Direct support for the validity of section 484 (h) is found in Judge Learned Hand's opinion in *U.S. v. Levine.*

There can be no question of the right of the legislature to establish a special class of "minors under 17". The legislature has found that such literature in the hands of such class of minors presents a clear and present danger to the State. The class is clearly defined as required by this Court's opinion in *Mishkin.*

II.

It would appear that appellant has raised an issue concerning the operation and effect of the statute—whether section 484(h) can be constitutionally applied to the four magazines in question.

Whether material is obscene to minors is a question of fact for the jury's determination. The scienter requirement affords no problem, that issue having been long ago decided in *Rosen v. U.S.* Acting as the finder of fact on those issues, the trial court's findings under

the Federal Constitution, and Seventh Amendment thereto, may not be reexamined in this Court.

As shown in the Statement of the case (*supra*), there is sufficient evidence to support Judge Chinman's findings of fact, both as to "obscenity" and as to "scienter".

III.

We are of the opinion that the reversals handed down in the obscenity cases during the 1966 term were wrongly decided. If this Court has accepted jurisdiction in this case for the purpose of establishing the minor's statute as the people's primary tool for fighting obscenity, it is proceeding unrealistically. That tool will not close the sluice gates on the new deluge of pornography which have been opened up by the results reached by this Court in the *Fanny Hill* case and in the 26 obscenity cases it reviewed during the 1966 term. A sample of such materials is attached hereto as Appendix "C".

Amicus is astounded at the work—product of this Court in the 26 obscenity decisions it rendered during the past term. Unable to decide the issue it framed for argument, it chose to decide those cases without benefit of briefing and argument—a most unfortunate decision. The results are totally irreconcilable with past decisions of this Court or any court this nation's history.

In the 26 cases, the materials were undeniably smut. The community standards of 11 states were in issue. In 8 cases, juries had made the determinations. In 11 of the cases, a hard-core pornography test was used. Each case had been approved by the appellate courts below, most by unanimous decisions. Yet, this court

saw fit to reverse 22 cases without any plausible explanation.

The inconsistent judgments of the individual justices are more fully described in the body of this argument. There is substantial evidence in the background facts of these cases to indicate that the members of this Court are making "personal" rather than "constitutional" judgments. Whereas in former cases the Court relied on redeeming social importance to establish its jurisdiction in such matters, none can be found in the subject matter of these cases and there is a serious question whether the Court in acting has not overstepped the limits of its jurisdiction.

We have searched without success for an answer to "why" the Court acted so unpredictably. If the reversals were accelerated by the appearance on the scene of a constitutionally sufficient minor's statute, with the thought of shifting emphasis to that type of law enforcement, this Court has been mislead—the minor's statute cannot be effectively enforced. Evidence of this can be found in those jurisdictions which presently have such statutes.

In order to make a minor's statute work, it is essential that a minor be used as an "operator", as in this case, Policy wise, this is bad practice, because of the "contributing to delinquency" factor. Beyond that consideration, few persons are willing to perform as have Mrs. Mary Corey and Richard Corey in this case. Nor is the mere presence of the statute a deterrent, as those jurisdictions having minor's statutes, can attest to.

If this Court were to shift the emphasis to the minor's statutes, it would work to defeat the primary pur-

pose of the obscenity statutes, which is, to get at the producers. By printing "For Adults Only" on such materials, the publisher would place himself beyond the reach of law enforcement.

The classification ordinance involved in the City of Dallas cases present a different problem than the minor's statute regulating the distribution of publications. In order to apply the latter regulation, it is necessary to enforce the restriction as to each seller—the successful application in one case has no effect on other cases. Not so in the classification situation. There, law enforcement acts to limit the exposure by totally limiting a segment of the audience.

This Court's decisions last term have opened the flood gates on a deluge of new pornography. Unless that area is checked, it will be impossible to keep the volume of such materials which are floating around from reaching the wrong audience.

We have appended hereto as Appendix "B" a synopsis of miscellaneous case histories indicating some of the troubles this nation is facing. The evidence is all around us that this nation in 1967 has embraced the monster vice. It was in this setting that this Court wrote its decisions last term. We reiterate our opinion that those cases were wrongly decided.

This Court should return to the norms of Ginzburg and Mishkin. *Ginsberg v. New York* should be affirmed but only upon the solid reasoning of Judge Learned Hand, and through acknowledgement of Justice Horlan's view regarding the limits of jurisdiction of this Court. The domain of sexual morality is primarily a matter of state concern and this Court should be slow to interfere with state legislation calculated to protect that morality.

ARGUMENT.

I.

New York Penal Law Section 484(h), Which Utilizes the Variable Concept of Obscenity, Is Constitutional. Since the Statute Does Nothing More Than Proscribe the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors, This Court's Decision Is Controlled by the Roth-Alberts Ruling in 1957, and the Ginzburg-Mishkin Rulings in 1966.

A. The Construction of Section 484(h), Adopted by the New York Court of Appeals, i.e., That the Statute Employs the Variable Concept of Obscenity and Proscribes the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors, Is Binding on This Court.

Appellant stands convicted of subsections 2(a) and 2(b) of Section 484(h) of the Penal Laws of New York. Those subsections read:

> "2. It shall be unlawful for any person knowingly to sell or loan for monetary consideration to a minor:
>
> "(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, or
>
> "(b) Any book, pamphlet, magazine, printed matter however reproduced, sound recording which contains any matter enumerated in paragraph (a) of subdivision 2 hereof, or explicit and detailed

verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors."

"Minor," "nudity", "sexual conduct," "sexual excitement", "sado-masochistic abuse", and "harmful to minors", as used in those subsections are further defined in subsection 1(a) through (f) as follows:

"1. Definitions. As used in this section:

"(a). 'Minor' means any person under the age of 17 years.

"(b) 'Nudity' means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

"(c). 'Sexual conduct' means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

"(d). 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

"(e). 'Sado-masochistic abuse' means flagellation or torture by or upon a person clad in undergarments, a masked or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

"(f). 'Harmful to minors' means that quality of any description or representation, in whatever

form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it: (i) Predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.

The "scienter" provisions read:

"(g). 'Knowingly" means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquire of both: (i) the character and content of any material described herein which is reasonably susceptible of examination by the defendant, and (ii) the age of the minor, provided, however, that an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor."

The above statute, enacted in 1965, was the outgrowth of an earlier decision of the New York Court of Appeals in *People v. Richmond County News,* 9 N.Y. 2d 578 (May 25, 1961), which, in a 4-3 decision, interpreted the New York State Obscenity Statute, Section 1141 of the Penal Law, to proscribe "hard-core pornography" only.

In the following years, the State Legislature, in their efforts to overcome some of the inherent difficulties of a "hard-core" test (which had the appearance of presenting a "constant" standard of obscenity), devoted their efforts toward an improvement of their Minor's

Statute. Their first attempt was struck down by the New York Court of Appeals, by 4-3 a vote, in *People v. Bookcase, Inc.*, 14 N.Y. 2d 409, 252 N.Y.S. 2d 433, July 1964 (Fanny Hill), and *People v. Kahan*, 15 N.Y. 2d 311 (March 18, 1965) (girlie magazines).

Thereafter, the State Legislature in 1965 adopted two separate and distinct approaches to the problem, which appear as Sections 484(h) (L 1965, ch. 327) and 484(i) (L 1965, ch. 372) of the Penal Laws. Section 484(h), set forth above, established a class of minors at 17 and below and required proof of scienter as to the minor's age. Section 484(i) established a class of minors at 18 and below and provided for strict liability in so far as age of the minor is concerned. The power of the Legislature to pass such statutes—variable concepts of obscenity—was contested and upheld in *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 271 N.Y.S. 2d 947, appeal dismissed for want of a properly presented federal question, ... U.S. ....., 17 L. Ed. 2d 11, 87 S. Ct. ..... (Oct. 10, 1966). A conviction under Penal Law Section 484(i) involving a sale of the girlie magazine "Candid" to a 17-year old was appealed on the grounds of vagueness, due process of law, and failure to require proof of scienter as to age, and was upheld in *People v. Charles Tannenbaum*, 18 N.Y. 2d 268, 274 N.Y.S. 2d 131, appeal dismissed as moot, ... U.S. ....., 18 L. Ed. 2d 1300, 87 S. Ct. ..... (June 12, 1967). Although the latter decision involved Section 484(i), the New York Court of Appeals had occasion to comment on Section 484(h) in its opinion.

Thus, the New York Court of Appeals has already been called upon twice to interpret Section 484(h). In *Bookcase, Inc. v. Broderick, supra*, that court made it

quite clear that Section 484(h) employed variable obscenity concepts and proscribed only that which was obscene to minors under 17, saying at page 76:

> "Section 484-h uses, instead of the word 'obscene,' a three-point definition—(1) predominantly appeals to the prurient, shameful or morbid interest of minors, (2) is patently offensive to prevailing standards of what is suitable for minors, and (3) is utterly without redeeming social importance which is virtually identical to the Supreme Court's most recent statement of the elements of obscenity. . . .
>
> "It is clear that there is no such thing as 'obscenity in the air'—that is, obscene matter does not exist in a vacuum but can be found only by reference to the group *to* whom the matter is directed or *from* whom it barred. The Supreme Court has used as its reference point the entire adult community when dissemination was to the public at large and a particular deviant group when the materials were primarily designed and disseminated to that group. (See also U.S. v. 31 Photographs, 156 F.Supp. 350 (U.S. Dist. Ct., S.D.N.Y. 1957), When the 'adult only' type of statute is tested as here, the reference point is the community of minors. . . ."

In *People v. Tannenbaum, supra,* the New York Court of Appeals again stated that the statute proscribed only what would be "obscene" to minors under the variable concept of obscenity:

> "In response to the deeply felt needs of the community, our State Legislature enacted . . . statutes . . . proscribing the dissemination, to infants

under 17 . . . of materials *obscene as to such infants. . . .*" (Our emphasis.)

"In Bookcase v. Broderick, 18 N.Y.2d 71, decided July 7, 1966, we upheld the Legislature's power to employ variable concepts of obscenity."

Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court must accept the state court's construction and proceed to test the validity on that basis. *General Trust Co. v. Blodgett,* 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents,* 360 U.S. 684, 688.

B. A Statute Employing Variable Concepts of Obscenity and Proscribing the Sale or Loan to Minors Under 17 of Subject Matter Which Is Obscene to Such Minors Has Its Parallel in Section 1141, Proscribing the Sale of "Sadistic" and "Masochistic" Materials and Should Be Controlled by the Principles Expressed by This Court in Mishkin v. N.Y.

In *Mishkin v. N.Y.,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, appellant raised the same questions regarding the word "sadism" and "masochism" used in New York Penal Law, Section 1141, that appellant does here regarding the words "harmful to minors" used in Penal Law, Section 484(h). Mishkin argued that such terms were unconstitutionally vague and the proscription of such materials exceeded the First Amendment's guarantee. The trial court, the Appellate Division, and the Court of Appeals in that case all had interpreted the words "sadism" and "masochism" as synonymous with the word "obscene", which interpretation was consistent with prior trial court decisions. Complaint of *Sumner v. Dial Press,* 182 Misc. 416, 48 N.Y.S. 2d

480, *People v. Brooklyn News Co.*, 12 Misc. 2d 768, 771.

The opinion of this Court in *Mishkin v. N.Y., supra,* at page 60, settled those issues:

> "Appellant attacks section 1141 as invalid on its face, contending that it exceeds First Amendment limitations by proscribing publications that are merely sadistic or masochistic, that the terms 'sadistic' and 'masochistic' are impermissibly vague, and that the term 'obscene' is also impermissibly vague. We need not decide the merits of the first two contentions, for the New York courts held in this case that the terms 'sadistic' and 'masochistic' as well as the other adjectives used in Section 1141 to proscribe books, are 'synonymous with obscene.' 26 Misc.2d at 154, 207 N.Y.S.2d at 393. The contention that the term 'obscene' is also impermissively vague fails under our holding in Roth v. U. S. . . ."

And at page 61:

> "Indeed, appellant's sole contention regarding the nature of the material is that some of the books involved in this prosecution, those depicting various deviant sexual practices, such as flagellation, fetishism, and lesbianism, do not satisfy the prurient appeal requirement because they do not appeal to a prurient interest of the 'average person' in sex, that 'instead of stimulating the erotic, they disgust and sicken.' We reject this argument as being founded on an unrealistic interpretation of the prurient-appeal requirement.
>
> "Where the material is designed for and primarily disseminated to a clearly-defined deviant sexual

> group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in Roth, 354 U.S. at 489, 490, 1 L.Ed.2d at 1510, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in Roth to serve the essentially negative purpose of expressing our rejection of that aspect of the Hicklin test, Regina v. Hicklin (1868) L.R.3, Q.B.360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the Hicklin test.
>
> "No substantial claim is made that the books depicting sexually deviant practices are devoid of prurient appeal to sexually deviant groups. . . ."

It is difficult to understand, in light of the nature of the *Mishkin* material and this Court's reasoning in the *Mishkin* case, noted above, how that case may not be considered determinative on the issues in this case. Not only has the Court of Appeals interpreted "harmful to minors" to mean "obscene to minors" but the State Legislature itself has, as noted by Justice Keating

above, defined it, using language which is identical to that used by certain members of this Court in what appears to be the most restrictive test for "obscene" yet devised.

The only difference is that Mishkin was charged with the crimes of "publishing obscenity" and "possessing obscenity for sale." Since no sale was involved, it was necessary to consider the probable recipient audience, *i.e.*, to whom the material was to be sold, or its equivalent, for whom it was designed. Here, however, the facts are otherwise and the issue is more narrowly drawn. The audience is identified by the charge, the charge being that appellant made several sales to a member of the special class. Appellant makes much of this in his brief, claiming an infirmity in the statute because it does not explicitly require that the material *itself* be "designed for" persons under 17 (Brief for Appellant, p. 20). But there is no such requirement under the law, as noted in *United States v. Rebhuhn,* 109 F. 2d 512, cert. den. 60 S. Ct. 976, 84 L. Ed. 1399, 310 U.S. 629, relied upon by this Court in *Ginzburg v. United States,* 383 U.S. 463, 16 L. Ed. 2d 31, 39, 86 S. Ct. 942. In *Rebhuhn,* the book "Sex Life in England" was written by and designed for men of science, yet that did not save him, because the material was *distributed* to a different audience. In *Ginzburg, supra,* at page 39, the same observation was made as to "The Housewife's Handbook on Selective Promiscuity".

Appellant is in error when he cites the Model Penal Code and New York Penal Law Section 235 (effective Sept. 1, 1967 and based on the Model Penal Code) in support of his proposition that the material *itself* must

also be "designed for" persons under 17. On the contrary, the requirements of those sections are stated in the alternative and support the validity of New York Penal Law, Section 484(h). The phrase "designed for" as used in those statutes means: "Directed to" or "aimed at". The reporter's comments to the American Law Institute Model Penal Code Section 207.10 provide at pages 36-38:

> "9. Obscenity Judged by Ordinary Adults, Unless Addressed to Special Audience. A fundamental question in current obscenity law is whether obscenity is to be measured by the response of average or normal individuals or by that of any child or perverted adult *to whose notice the material may come*. . . .
>
> "Subsection (2) of proposed Section 207.10 requires obscenity to be judged with reference to ordinary adults *unless the material* is designed for or *directed to children* or other specially susceptible audience. . . ." (Our emphasis.) Similarly New York Penal Law Section 235 (effective Sept. 1, 1967) provides:
>
> "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material *or* the circumstances of its dissemination to be designed for children or other specially susceptible audience." (Our emphasis.)

Thus, mere proof that subject matter was actually disseminated to a member of the special class of children would invoke the special rule for children.

Appellant is in error when he credits Lockhart and McClure as the engineers of the so-called variable obscenity doctrine (Brief for Appellant, p. 19). Variable obscenity came into the law through the opinions of Judge Learned Hand. It is Judge Learned Hand's writings which form the foundation for not only the Model Penal Code sections on obscenity (of which he was one of the drafters), and New York Penal Law Section 235 (which is based on the Model Penal Code), but also the special minor's statute, which is at issue here, Section 484(h). In *United States v. Levine,* 83 F. 2d 156, 157 (1936), Judge Hand said:

> "What counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. Thus, 'obscenity' is a *function of many variables.* . . .
>
> "The case was not tried on this theory; on the contrary, the judge supposed that a book or picture was obscene or innocent by an absolute standard independent of its readers. . . . He was in error. . . ." (Our emphasis).

And at page 158:

> "It may appear that the prospective buyer in the 8th count was a youth and that the accused had reason to suppose that he was. The evil against which the statute is directed, would then be the possible injury to such a youthful reader. It is when the crime consists of importing the work, or offering it for general sale, that the test cannot be found in the interests of those to whom it is sent, though abnormally susceptible. . . ."

United States v. Levine was cited with approval in the *Roth* case, 354 U.S. 476, fn. 26, as an example of the correct modern rule.

"Minors under 17" constitute a clearly defined class (*Mishkin, supra,* at page 62) which is worthy of special consideration and as to which there should be little question of constitutional infirmity. As the Court of Appeals noted in *Bookcase, Inc. v. Broderick, supra,* at page 77:

> "While our country was founded upon, and has thrived on, the unlimited exposure to all forms of religion and political ideologies, we know of no commitment in all of our history—from the Massachusetts Bay Colony to the freedom movements of today—to the exposure of our young to all forms of lust, perversion and sadism. . . ."

Further as pointed out by the same court at page 77:

> "Our own Legislature has declared by law that such literature is 'a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of youth and a clear and present danger to the people of the state' (Penal Law Section 484-e)"

II.

The Magazines Are "Harmful to Minors" Within the Tests Set Forth in the Statute. Further, the Scienter Requirement, and Evidence Thereon, Present No Constitutional Infirmity.

It would appear that appellant has succeeded in raising an issue as to whether Section 484(h), assuming it is valid, can constitutionally be applied to the magazines in question: "Escapade", "Man to Man", "Sir" and "Mr. Annual". In his jurisdictional statement, appellant broadly phrases the first of two questions presented, as:

> "1. Is Section 484(h) of the Penal Law repugnant to the Constitution of the United States in that its *operation and effect* is to restrain expression in violation of the First and Fourteenth Amendments?" (Statement as to Jurisdiction, p. 3.) (our emphasis).

This Court noted jurisdiction on that question. *Sam Ginsberg,* 18 L. Ed. 2d, 1344 (June 12, 1967). In his Summary of Argument (Brief for the Appellant, p. 8) he says:

> "The magazines in question are not obscene by the Court's own decisions. The only charge against Ginsberg is that they contain nudes, in that the female breast is fully exposed. The trial court held that this alone fulfilled *all* the elements of the crime. *We urge that the magazines are not harmful to minors within the tests set forth in the statute.*" (Our emphasis.)

Whether material is obscene to minors is a question of fact for the jury's determination. *United States v. Kennerley,* 209 Fed. 119, 120 (S.D.N.Y. 1913), *United States v. Levine,* 83 F. 2d 156, 157 (1936), Pollock and Maitland, History of the English Law, 624 (2d Ed. 1952), *Roth v. United States,* 354 U.S. 476, 490. See also Justice Brennan dissenting in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, at 448:

> "Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."

The "scienter" requirement affords no problem. *Rosen v. United States,* 161 U.S. 606; *Roth-Alberts, supra,* fn. 28.

Where the jury is waived and tried to the court, the trial judge acts as the finder of fact, and this Court may not reexamine the question of fact presented in the lower court. U.S. Constitution and Seventh Amendment thereto. Trial Judge Chinman's findings of fact, both as to "obscenity" and "scienter" appearing at pages 17-18, *supra,* are supported by sufficient evidence. (See Statement of Case, *supra*). *United States v. Kennerley,* 209 Fed. 119 at 120.

III.

Section 484(h) Will Not by Itself Solve This Nation's Obscenity Problem. Ginsberg v. New York Should Be Affirmed Upon the Reasoning of Judge Learned Hand and the Constitutional Views Expressed by Justice John Marshall Harlan.

Amicus is gravely concerned by the radical change in attitude adopted by this Court in its treatment of obscenity cases during the 1966 October Term. We are of the opinion that those cases were wrongly decided.

If this Court has noted jurisdiction in *Sam Ginsberg v. New York* with the intention of establishing a minor's statute as the primary tool for the people to fight obscenity, it is proceeding unrealistically. This Court still has time and, through its opinion herein, should close the floodgates it opened in its decisions in *Redrup-Austin-Gent*, ... U.S. ...., 18 L. Ed. 2d 515, 87 S. Ct. .... (May 8, 1967) and other cases last term.

More important, however, we are concerned that this Court should know of the consequences flowing from those decisions, as witnessed in the immediate reaction thereto by the pornographers throughout the country. We have previously called the attention of this Court to the consequences flowing from its previous decisions in the cases decided on June 22, 1964. See Brief Amicus Curiae of Citizens for Decent Literature, Inc., filed in *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of the Commonwealth of Massachusetts* at pages 79-84. An example of the new materials appearing on the market immediately after the decisions in *Redrup-Austin-Gent*, ... U.S. ....,

18 L. Ed. 2d 515, 84 S. Ct. ..... (May 8, 1967), is attached hereto as Appendix "C".*

Amicus is astounded at the work product of this Court during the past term—but we think a review of the results reached in those cases affords good reason for our astonishment.

Having accepted *Redrup v. N.Y.*, 16 L. Ed. 2d 438 (April 25, 1966), *Austin v. Ky.*, 16 L. Ed. 2d 438 (April 25, 1966) and *Gent v. Arkansas*, 16 L. Ed. 2d 537 (May 16, 1966) for argument on the scienter issue, while at the same time denying that the subject matter, therein involved, had constitutional protection, this Court was unable, seven months after oral argument and submission of the case, to resolve that issue. Instead of carrying the matter over to the following term for reargument, or expanding the issues for new

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*1: The Organization, Greenleaf Classics Inc. (GC 232).
2. The Autobiography of a Flea, Greenleaf Classics Inc. (GC 227).
3. Flossie, Pendulum.
4. Debauched Hospodar and Memoirs of a Young Rakehell, Holloway House (HH 145).
5. The Adventure of Father Silas and Flesh and Bone, Holloway House (HH 148).
6. Memoirs of Jospehine M., Continental Classics (CC 113).
7. Confessions of a French Countess, Continental Classics (CC 116).
8. The Way of a Man With a Maid, Victorian Classic (VC 103).
9. A Town Bull, Victorian Classic (VC 107).
10. Seduction of Suzy, Collectors Publication.
11. With Open Mouth, Collectors Publication.
12. The Awful Disclosures of Maria Monk, Bilife Publications (TNC 202).
13. Gay Sisters in Bondage TW 1-72.
14. Lesbian Collectors, TW 1-69.
15. The Memoirs of Josephine Mutzenbacher, Brandon House P 2033.
16. Modern Nudist No. 6.
17. Cheri No. 2.

argument, the Court handed down a flurry of decisions in cases which were never briefed, and which, taken individually and as a group, are irreconcilable with any of the past decisions of the United States Supreme Court in this area, during its entire history.

An analysis of the *Redrup-Austin-Gent* opinion shows it to add nothing new to other "no-clear majority" decisions of this Court. See Musmanno dissenting in *Comm. of Pa. v. Robin,* 218 A. 2d 546. That opinion says nothing more than this Court's *per curiam* decision did in *Grove Press, Inc. v. Gerstein,* 378 U.S. 577, 84 S. Ct. 1909, 62 L. Ed. 2d 1035 (June 22, 1964), except that Justices Warren and White changed sides, both having divergent views. Further, the 23 remaining decisions without opinion destroy completely the sanity which the *Ginzburg* and *Miskkin* opinions promised to bring to this area of the law. To say that the law is currently up in the air is an understatement of the true state of affairs.

A total of 26 cases involving obscenity determinations were decided by this Court. *Redrup v. N.Y.,* 18 L. Ed. 2d 515; *Austin v. Ky.,* 18 L. Ed. 2d 515; *Gent v. Arkansas,* 18 L. Ed. 2d 515; *Jacobs v. N.Y.,* 18 L. Ed. 2d 1294; *Tannenbaum v. N.Y.,* 18 L. Ed. 2d 1300; *Keney v. N.Y.,* 18 L. Ed. 2d 1302; *Friedman v. N.Y.,* 18 L. Ed. 2d 1303; *Ratner v. Calif.,* 18 L. Ed. 2d 1304; *Cobert v. N.Y.,* 18 L. Ed. 2d 1305; *Shepherd v. N.Y., Lewis v. N.Y., Bloomberg v. N.Y.,* 18 L. Ed. 2d 1306; *Avansino v. N.Y., Cessa v. N.Y., Strombelline v. N.Y., Gaggi v. N.Y., Costanza v. N.Y.,* 18 L. Ed. 2d 1308; *Aday v. U.S.,* 18 L. Ed. 2d 1309; *Corinth Publications, Inc. v. Wesberry,* 18 L. Ed. 2d 1310; *Books, Inc. v. U.S.,* 18 L. Ed. 2d 1311;

Rosenbloom v. Va., 18 L. Ed. 2d 1312; *A Quantity of Books v. Kansas,* 18 L. Ed. 2d 1314; *Mazes v. Ohio,* 18 L. Ed. 2d 1315; *Shackman v. Calif.,* 18 L. Ed. 2d 1316; *Landau v. Fording,* 18 L. Ed. 2d 1317; *Wenzler v. Pitchess,* 18 L. Ed. 2d 1351. The community standards of 11 states were drawn in issue. In every one of these 26 cases, the state and federal courts had held the subject matter to be obscene, and on appeal, the Appellate Courts had agreed. In eight of these cases, the determinations were made by jurors, chosen from the communities involved. In 11 of these cases the state courts (California, New York and Kansas) had used a hard-core pornography test in affirming the matter on appeal as being obscene. Yet this Court saw fit to reverse 22 of these without any plausible explanation.

The type of materials brought before the High Court in these cases was uniform. There were 20 sex paperback books, their titles were: "Sex Life of a Cop", "Lust School", "Lust Web", "Sin Servant", "Lust Pool," "Shame Agent", "Lust Job", "Sin Whisper", "Orgy House", "Sin Hooked", "Bayou Sinner", "Lust Hungry", "Shame Shop", "Flesh Pots", "Sinners Seance", "Passion Priestess", "Penthouse Pagans", "Shame Market", "Sin Warden" and "Flesh Avenger"; 12 bondage books, several hundred photographs of nude females in provocative poses with focus on the pubic area and suggested invitations to sexual relations; 8 motion picture films of the strip-tease type, 10 girlie magazines, one nudist magazine, and two home-made so-called "underground" film. Nowhere could it be claimed that art was involved, unless one might look to the two "underground" films—and strangely enough, neither of those were cleared by this Court.

It would serve no purpose to review the entire subject matter there involved. We question however, inasmuch as no written opinions were rendered, if this Court is aware of the total impact of its decisions as for example in *Shackman v. Calif.*, giving this Court's approval to the 8 mm. and 16 mm. films, "O-7" and "O-12". The Court will recall the nature of those films from the description of Judge Hauk in his opinion in *Shackman v. Arnebergh,* 58 F. Supp. 983, 991:

> "The film 0-12 . . . was viewed by the court. The film consists of a female model clothed in a white blouse opened in front, a half-bra which exposes the upper half of the breasts including the nipples and a pair of white capri pants (which are soon discarded) under which the model wears a pair of sheer panties through which the pubic hair and region are clearly visible. The film consists of the model moving and undulating upon a bed, moving her hands, and lips and torso, all clearly indicative of engaging in sexual activity, including simulated intercourse and invitations to engage in intercourse. There is no music, sound, story line or dancing other than exaggerated body movements. On at least three occasions, the female by lip articulation is observed to state, 'fuck you', 'fuck me'.
>
> "The film 0-7 is virtually the same as Exhibit 1. The model wears a garter belt and sheer transparent panties through which the pubic hair and external parts of the genitalia are clearly visible. For at least the last one-half of the film, the breasts are completely exposed. At one time the model pulls her panties down so that the pubic

> hair is exposed to view. Again, the focus of the camera is emphasized on the pubic and rectal region and the model continuously uses her tongue and mouth to simulate a desire for, or enjoyment of, acts of a sexual nature . . ."

Does this Court know that such films are now appearing in bars to supplement the topless fare, and on the large screens in neighborhood movies? Eight-15 minute reels constitute a two hour fare! They are quick to advertise that such have the imprimatur of this Court.

Previously this Court had relied upon "redeeming social importance" to establish its jurisdiction in such matters. There was no claim made in these cases, however, that any such element existed, nor does amicus feel that such could honestly be claimed. If the constitution guarantees to the people the right to have questions of fact determined by juries, and we have always thought that it did, there is a serious question whether this Court has not overstepped the limits of its jurisdiction.

Although the *Redrup-Austin-Gent* opinion was a "no-clear" majority decision and added nothing to the prior decisions of this Court, its rationale was the only reasoning offered to govern the entire 26 decisions. Justices Black and Douglas restated their position that a state could not suppress obscene writings, Stewart held to the view that only hard-core pornography could be proscribed, Brennan, Fortas and Warren adhered to their views that there were three independent tests which must "coalesce", and Justice White retained his view that the social value test was not an independent factor. It is becoming increasingly

apparent, in our opinion that the members of this Court are making "private" and not "'Constitutional" judgments.

The Court in its opinion did not discuss the nature of the materials or the circumstances surrounding their dissemination. Nor did the Court report the evidentiary facts presented in the record in each case and, as stated before, the Court did not point to any item of redeeming social importance.

Not only were the majority of 7 not in agreement on the rationale of *Redrup-Austin-Gent,* but they were also in disagreement in the application of the divergent tests to specific materials, the voting in the individual cases ranging from 8-1 and 5-4 in one direction to 5-4 in the other direction.

Even those Justices who were in agreement as to the test to be applied on review, did not arrive at the same result in their personal application of that test. Presumably Justices Warren, Fortas and Brennan were in agreement that the three "separate" tests must "coalesce". Yet in the girlie strip-tease film cases, Justice Fortas thought the films not obscene, whereas Justices Brennan and Warren thought otherwise; in the girlie photo cases, Justices Brennan and Fortas thought them not obscene, whereas Justice Warren thought overwise; in the paperback book cases. Justice Warren voted to set them for argument, whereas Justices Fortas and Brennan voted for reversal, except that in the paperback "publisher" case involving "Sex Life of a Cop", Justices Warren and Brennan voted to remand for reconsideration as to the test involved, whereas Fortas voted for reversal on the grounds that it was not obscene. How this latter decision can be reconciled with the *Ginzburg* decision and opinion is difficult to comprehend.

The individual judgments of the separate justices were not consistent. Justice Brennan, who thought the girlie strip-tease movies to be obscene, was of the opinion that still photos of the same type of action, *i.e.*, photos focussing on the vagina or backside, suggesting invitations to intercourse or sodomy, were not obscene. Yet, in *Fried v. New York,* cert. denied 378 U.S. 578 (June 22, 1964), the defendant served 60 days for the same material. In *Kingsley Books, Inc. v. Brown,* Justice Brennan strongly urged that a jury make the determination, yet in these cases he overruled what clearly appeared to be jury matters. Chief Justice Warren, who thought the materials in *Roth, Ginzburg* and *Mishkin* were obscene, in considering the same type of materials in *Austin, Keney, Redrup, Gent* and *Friedman,* could not see any similarity. Justice Warren, who castigated the Attorney General of Kansas in 1964 for employing the injunctive device and exorted him to prosecute criminally, voted to reverse criminal convictions in *Redrup, Austin, Keney,* and *Friedman.* In *Jacobellis v. Ohio,* 378 U.S. 184 (June 22, 1964), Chief Justice Warren said community standards meant "local" community standards, and the communities throughout the United States were "diversified" and that the Supreme Court should respect the lower's court's determination, yet he ignored jury verdicts in *Austin, Keney, Gent and Aday.* In the *Mishkin* case in 1966, six justices voted to affirm, yet in *Friedman v. N.Y.,* dealing with almost identical subject matter (sadistic and masochistic material) five of those six justices voted to reverse.

While the Court voted the underground film "Un Chant D'Amour" obscene 5-4, that same majority of five was unable to get together on a lower grade film

"Flaming Creatures" which depicted a 7-minute rape scene, acts of oral intercourse, fondling of the female vagina and breasts, masturbation of the visible penis and the like, some of which were suggested but never shown in the film "Un Chant D'Amour." The Court avoided a decision in that matter by holding the issues "moot."

We have searched without success for the answers to explain why this Court took such a radical turn, when a solution to the problem, worked out in Ginzburg and Mishkin, appeared in sight.

If the appearance of New York Penal Law Section 484(h) on the horizon was a significant factor, then this Court must recognize, as is commonly known to law enforcement, that in looking at the minor's statute it is looking at a mirage, in so far as effective enforcement of the law is concerned.

Assuming such a statute is available to the communities, can such a law be enforced? The answer is obvious—no. If an inquiry were made of the Rhode Island jurisdiction or of any other state having such a law, it would be made known that the number of cases filed under that statute would be close to zero. As an example, after the June 22, 1964 decision in *Jacobellis v. Ohio,* the Los Angeles County District Attorney's office contacted the Juvenile Division of the County Sheriff's Department with the thought of working out a test case on Penal Code Section 311.3 (Sale to Minors) based upon the advice of Justice Brennan in the *Jacobellis* case. The Sheriff's Office was reluctant to make use of minors as working operators, it being against their policy because of the "contributing to de-

linquency" aspect. After some discussion, it was decided that such a test was proper, if the parents of the minors consented to their use as operators, and if close surveillance was made of the operators by law enforcement. All Sheriff's stations were alerted to look for reported violations of sale to minors, so that a test case could be undertaken. In the six month period between July and December, 1964, no sales were reported.

The above points out one of the weakness of the statute. Who is to enforce it? Suppose "A" violates the statute and sells to minor "B", who is to report the violation? Certainly not "A", the violator, nor "B", the victim. If "B" is caught with the material by his parents or his school principal, what are the chances that "A's" identity will be learned. More than likely "B" will adopt a cover-up story to conceal "A's" identity. Today, nobody wants to be classed as a "fink." The case of Richard Lance Corey in *Ginsberg v. N. Y.*, is the exception. Even if "B" is willing to reveal "A's" identity to his parents or school supervisors, what parent is going to the police to volunteer his or her child as a prosecuting witness, and lay the family open to adverse publicity? It would be a super-parent who would offer his offspring to act as the watch dog for the community in this problem area. Once again, Mrs. Mary Corey is an exception on the modern scene.

Assuming the complaint were filed, the further issues of "Who made the sale?," and "Did the seller know the victim's age?" would still be questions of fact for the jury, the resolution of which would depend upon how convincing a story was told by the minor "B" in identifying "A", and in "A's" denying having made the sale and knowledge of "B's" age.

If the argument is made that the mere existence of such a statute would be a deterrent, in that sellers would watch their sales so as not to bring themselves into violation the answer is, that it has not proven so, where in use. And as noted by defense counsel, what is to prevent an adult from making the purchase and passing it on? Certainly it is recognized that a purchaser rarely burns the material after reading the same. For example—an actual case—an adult dropped cut-outs from nudist magazine in front of three girls at a high school and told the girls to pick the pictures up. It is standard operating procedure for such materials to be purposely dropped on the school grounds and in church and neighborhood areas.

If this Court were to indicate that the minor's statute should be the principal approach to the problem, it would, thereby, guarantee immunity to the publisher who will place a "For Adults Only" sign on the material. Whereas formerly, and as expressed in the model penal code case comments (Reporter's Comments to 1957 draft, at page 13), the purpose of the obscenity statutes is to get at the producers aand circulators, the operation of the minor's statute is to effect the contrary.

There is a difference in the effectiveness of a minor's statute regulating the distribution of publications, and a classification ordinance which regulates the exhibition of a motion picture film. Unlike the solution offered in *Interstate Circuit Inc. v. City of Dallas,* No. 56, appeal filed March 3, 1967, and *United Artists Corporation v. City of Dallas,* No. 64, appeal filed March 16, 1967; and jurisdiction noted, 18 L. Ed. 2d 620 (May 15, 1967), which acts to limit the exposure

by totally eliminating a segment of the audience which may see the subject matter, there is no similar degree of control in the administration of minor's statutes like section 484(h), regulating the distribution of publications. In order to apply the latter regulation it is necessary to enforce the restriction as to each seller, and the successful application in one case, as noted above, will have little effect on other distributions to minors. The affirmation of Ginsberg's conviction will not significantly deter future distributions to minors.

Particularly does this minor's problem become more acute since this Court, by its decisions in the 1966 Term, has opened the sluice gates on a new deluge of pornography. It is reported that in a period of five months, a total of two million copies of 24 titles of Collector's Publications, similar to those enclosed, were distributed nationwide by that one publisher. It is reported that he has a total of 300 of such titles on his drawing board. To say that Section 484(h) can effectively prevent the volume of these materials (which are floating around as a result of this Court's ruling in the *Fanny Hill* case and the reversals during the 1966 term) from reaching the wrong audience is an unrealistic dream.

The Miscellaneous case histories synopsized in Appendix B are surely some evidence that the May 8, 1967 and June 12, 1967 decisions were ill advised. The parents of the 12-year old girl who was raped on the city streets by a 20-year old boy with a girlie magazine in his hip pocket will not understand this Court's decision which reversed the state rulings which sought to control the girlie magazine problem. The parents of seven teen-agers who sexually attacked a 12-year old girl, will

not be able to understand the logic of this Court's actions which have neutralized state efforts to control the runaway distribution of subject matter which instructs, in enticing terms, that perversion is acceptable—material which the youths themselves indicated was their primer of instruction for the sexual crimes they committed. The parents of a 19-year old girl who was raped and murdered by a youth who forcedly entered her car at an intersection in the afternoon, after spending the morning watching lewd motion picture films, will be unable to accept a Court's determination which holds such films to be constitutionally protected against the contrary demands of the state governments.

More and more, district attorneys like Bergna and Booth are noting that there is more of this type of thing than we suspect.

Conclusion.

We recognize that vice and pornography are not new to the scene. Such is but a recurrence in the cycle of history and the nature of man. Yet—we would point to the moral problems this nation faces, and recommend the wise counsel of Alexander Pope, speaking in his essay on The Monster Vice in 1705, of the same battle being waged in that century:

"Vice is a monster of so frightful mein,
As to be hated, only needed to be seen,
Yet seen to oft, familiar with her face,
We first endure, then pity, then embrace."

The evidence is all around us that this Nation in 1967 has embraced the monster vice. Those statistics are known. Since 1957 the juvenile delinquency cases

have almost doubled to more than 1.1 million in 1965. Between 1960 and 1966, juvenile arrests for homicide went up 31.3%, rape 34%, robbery 55% and aggravated assault 115%—many of the latter offenses involving brutal and wanton beatings of helpless persons. During this period of time, American aged 10 to 15 increased by less than 20%. U.S. News & World Report, Oct. 9, 1967, page 74. The spiralling climb of illegitimate births is told in these figures: In 1950 about 1 out of 25 children born in the United States was illegitimate. By 1960 the figure was one out of 19, by 1965 it was one out of 15 American births. If trends continue at the recent rate, at some time in the 1970's one out of every 10 American babies will be born out of wedlock. Already in some major cities, far more than 10% of new babies are illegitimate. U.S. News & World Report, Oct. 2, 1967, page 84. *It was in this setting that the United States Supreme Court wrote its decisions during the 1966 Term. We reiterate our opinion that the 1966 Term cases were wrongly decided.*

We think this Court should alter its course and reestablish the norms which existed at the end of the 1965 October Term—immediately after the decisions in the *Ginzburg* and *Mishkin* cases.

Sam Ginsberg v. New York should be affirmed but only upon the reasoning in the past opinions of Judge Learned Hand (*i.e.*, that the minors situation is but one application of the overall obscenity control mechanism.) And through acknowledgment of Justice Harlan's views regarding the jurisdiction of this Court.

This Court cannot escape the judgment that "the domain of sexual morality is preeminently a matter of

state concern," and "the Court should be slow to interfere with state legislation calculated to protect that morality" . . . Justice John Marshall Harlan, concurring specially in *Alberts v. California.*

Respectfully submitted,

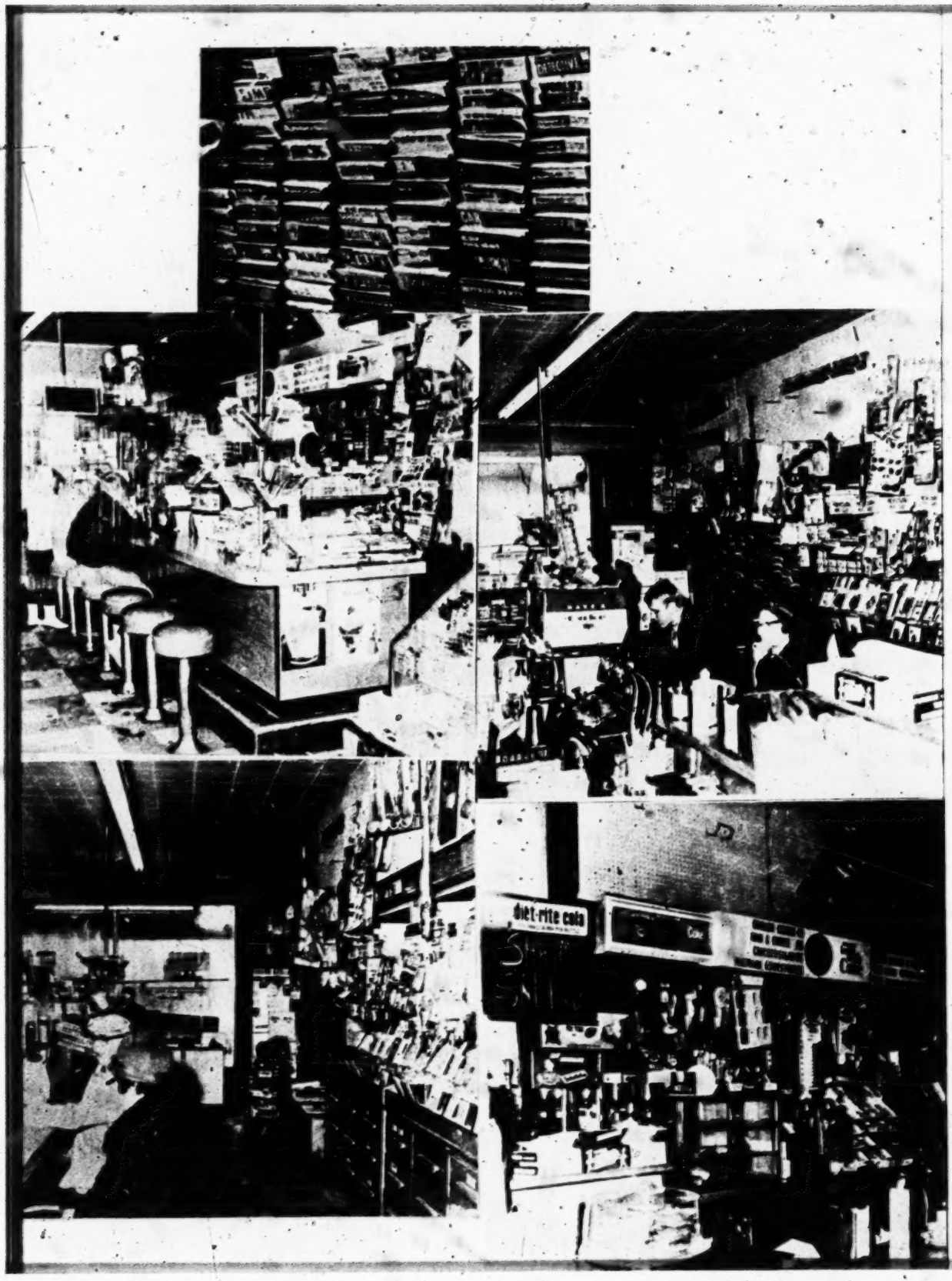
CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Amicus Curiae.

HOW MANY HOMO COLLEGE MENT FROM OUR OWN SEX SURVEY
SIR!
SPEED, SEX AND DESTRUCTION
THE MOB WENT WILD
ENCORE FOR SIRMATES
THE BEATNIK BOOK TO END 'EM ALL

mr. ANNUAL
WIFE SWAPPING IN THE SOCIAL SECURITY SET
AMERICAN BREAKTHROUGH
ANATOMY AND DECOR OF THE FEMALE LEG
SEX LIFE OF AN UNMARRIED WOMAN
WHAT THEY DON'T TELL YOU ABOUT TOKYO
CONFESSIONS OF A VOYEUR
JEANNE BLACKBURN
DARTLAND DELROY

ESCAPADE
those who need convincing
Born free on Bornholm
Escapade visits Rutgers University
Orgy on a Paris stage

BIRTH CONTROL METHODS FOR MALES
man to man
AN INTERVIEW IN DEPTH
MAMIE VAN DOREN
Talks of Love and Men
EXCLUSIVE SEX SURVEY
U.S. SINGLE GIRLS
FICTION
"The Sun Was Gone"
JOHN STEINBECK
on "Death and Insurance"
VIET NAM—
THE UGLY WAR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APPENDIX "B."

Miscellaneous Cases From News Accounts and Other Sources.

1. *Murder—Sexual Perversion.* Male, aged 27, and female, aged 23, murder a girl, aged 10, and boys, ages 12 and 17. Prior to their death murderers employed torture and sexual perversion and tape recorded the events. Lewd photographs of young girls in pornographic poses and a library of pornographic and sadistic literature (DeSade) were found in the male's possession. See Ian Brady/Myra Hingley Moors case. December 9, 1965, and Lady Snow's book, "On Iniquity" by Scribner, discussing this famous Moors case.

2. *Rape—Murder Case.* Two male youths spend the morning and early afternoon drinking alcoholic beverage and watching lewd motion picture films. At about 3:30 P.M. one youth forcibly enters a car driven by a 19-year-old girl, when it was stopped for a traffic light, forcing her to drive him to a secluded area where he killed her after trying to rape her. See Doss case, Freehold, N.J., Nov. 1, 1966.

3. *Rape Case.* Seven Oklahoma teenage male youths gang attack a 15-year old female from Texas, raping her and forcing her to commit unnatural acts with them. Four of the youths, two the sons of attorneys, admit being incited to commit the act by reading obscene magazines and looking at lewd photographs. See Fellers case, Oklahoma City, Feb. 1, 1966.

4. *Rape—Murder Case.* Male, aged 16, is identified by a 59-year old female victim as the person who criminally attacked her in her home. Youth admits to having read an account of a criminal assault in a

magazine in a neighborhood store after which he walked around the neighborhood, passed the victim's house and decided to break in. The victim told detectives that she pleaded with the man, "I'm an old woman and I don't have any money." She said he replied that he did not want money. The intruder then dragged her into the bedroom and ripped off her clothes. See McGowan case, Akron, Ohio, Nov. 19, 1966.

5. *Assault.* Male youth, aged 13, admits attack on a young girl in a downtown office was stimulated by sexual arousal from a Stag magazine article he had previously read in a public drugstore, which showed naked women and an article on "How to Strip a Woman". See affidavit of youth, dated June 30, 1965.

6. *Rape—Juvenile Delinquency.* Investigating the case of a 16-year old youth who raped a 10-year old girl, police found in his possession three homosexual playing cards. A number of these cards were found in possession of other boys of that neighborhood, ranging in age from 13 to 16. See Report of Capt. G. E. Matheny, Juv. Off., San Antonio, Texas, Police.

7. *Attempted Rape—Juvenile Delinquency.* A 15-year old boy grabbed a 9-year old girl, dragged her into the brush and was ripping off her clothes. The girl screamed and the youth fled. The next day he was picked up by police. He admitted that he had done the same thing in Houston, Galveston, and now in San Antonio. He said that his father kept pornographic pictures in his top dresser drawer and that each time he pored over them the urge would come over him. See Report of Capt. G. E. Matheny, Juv. Off., San Antonio, Texas, Police.

8. *Rape Case.* Woman is raped on the way to church one morning. Just prior to the attack the man was reading obscenity in his panel truck. Cleveland, Ohio. See County Prosecutor Corrigan's story in Universe Bulletin, April 14, 1967.

9. *Rape Case.* Santa Clara County District Attorney Louis Borgna reports, as printed in San Jose, California, Mercury, Nov. 23, 1966:

> "Santa Clara County Crime File documents cases where teenage boys have attacked, and killed, women after their sex drives were ignited by lewd photos from readily available men's magazines. One youth after seeing a beautiful young girl kidnapped and held prisoner in the British movie, The Collector, carted off a girl and held her for 18 hours while he forced her to commit every act you can possibly imagine. In his home we found nothing but this type of magazine. . . . The adult bookstores are loaded with books on sadism and masochism—sexual satisfaction through the infliction or receiving of pain." Showing the thin book, he said it contained photos of women tied up or being beaten up by other woman and it sells for $5.20. "In Santa Clara County we used to think these things were academic," Bergna said, "but a year or so ago police discovered in Sunnyvale a torture chamber where a young professional man beat other men and committed unnatural sex acts. We just completed another case in the Gilroy area in which a young sailor was bound and beaten by another man bent on fulfilling his sexual hunger. *It just might be we have more of this type of thing in this country that we suspect.*" (Our emphasis.)

10. *Murder Case.* Male youth, aged 14, admits slaying of 9-year old girl. Body was found in a junk-filled shed which was used as a neighborhood playhouse. Among the articles removed from the shed were some magazines of a pornographic nature. See Lang case, Denver, Colo., June 30, 1966.

11. *Murder Case.* A sackful of pornographic magazines were found near a waterfilled ditch where the bodies of two strangled girls, aged 5 and 6, were discovered. See Tift/Reynolds (victims) case, Cannock Chase, England, Jan. 15, 1966.

12. *Kidnap Case.* Seven-year old female kidnapped by 22-year old parolee with two previous molesting convictions. Victim was photographed in the nude and was squirted in the eyes with tear gas to prevent identification. Nudist magazines were found in the car and at his home. See Adkins case (victim), Cleveland, Ohio, January 1965.

13. *Juvenile Delinquency—Sex Gang.* A juvenile sex gang involving boys 7 to 15, plus one 3-year old, was discovered in Oklahoma. An attorney representing one of the 15-year old boys revealed the boy told him they and sub-teenage youngsters had bought magazines at various grocers and drugstore newsstands and were incited by pictures of men committing unnatural acts and men and women in lewd photos. See Wilson case, Valley Brook, Oklahoma, Jan. 27, 1966.

14-16. *Juvenile Delinquency—Sex Perversion.* Male, aged 42, uses lewd photographs of males and money to entice other male youths to pose for photographs and participate in lewd acts. San Leandro, Calif. case, July 21, 1967; Welty case, Portage, Mich., Mar. 21, 1965; and Gardiner case, Parkland, Md., Mar. 31, 1965.

17. *Juvenile Delinquency—Sex Perversion.* An interested person discloses conversation with teenage member of gang who revealed that teenage gangs indulging in acts of perversion were using Playboy to get them excited. See letter of Sept. 8, 1965.

18. *Juvenile Delinquency—Child Molestation.* Two girls, aged 9 and 12, told police that the male owner of a bookshop, aged 58, located next to a high school had shown them photographs of naked men and women and had abused one of them. Police indicated that the bookstore owner had previsouly spent two years in jail for molesting a girl 10 years old. When arrested police found thousands of obscene magazines and books in the shop. See Cohn case, New York, N.Y., 1965.

19. *Juvenile Delinquency—Child Molestation.* A male individual brings two girls, aged 13 and 15, into his home which is filled with obscene literature and has relations with them. Cleveland, Ohio. See County Prosecutor Corrigan's story in Universe Bulletin, April 14, 1967.

20. *Juvenile Delinquency—Child Molestation.* The Journal of Atlanta, Ga., of Jun. 6, 1966, reports "A psychiatrist examining a man charged with molesting a 10-year old girl in Fulton County last year reports: 'He states he would often buy . . . . books which were illustrated by pictures of women wearing varying amounts of clothing assuming suggestive positions . . .'"

21. *Juvenile Delinquency—Child Molestation.* First Ass't. States Attorney Edward M. Booth, Jacksonville, Fla., writes in his letter of May 27, 1966, . . . "we have four felony charges pending in our criminal courts at this time wherein adults are charged with various sexual offenses involving minor Children. In

each of these four cases, we have found that obscene literature and other pornographic materials were used to entice minor children ranging in age from 8 to 16 years, including both boys and girls, into indulging in various lewd and lascivious sexual acts with the adults involved. . . . I have found that most cases involving sexual activities with minor children have obscene and pornographic literature and materials involved, and, *perhaps, this is true throughout the country . . .*" (Our emphasis.)

22. *Sex Perversion—Juvenile Delinquency.* Defendant male, 28, invited boys, 13 and 15, to a house in Brentwood where they swam, watched TV, were served vodka and 7-Up, and shown "Playboy" magazines. Defendant engaged in an act of oral copulation. See People v. Cramer, 60 Cal. Rptr. 230, 231, where the California Supreme Court held evidence of one such act was admissible in prosecution for a second offense as evidence of a "common design, plan or modus operandi", reversing a lower appellate court holding to the contrary in 55 Cal. Rptr. 701.

23. *Juvenile Delinquency—Sex Perversion.* A 5-year old boy was the victim of sodomy by a 15-year old boy. The youth arrested said he had seen a number of these homosexual playing cards and had heard men and older boys talk about such acts. He admitted committing these acts on several small boys.

24. *Juvenile Delinquency.* A 17-year old youth was picked up for writing an obscene and suggestive letter to a 14-year old girl. The youth took the officer to the neighborhood drugstore and showed him the books he had been reading—"Vengeful Virgin", "Sex Appeal", "How to Make Love", all available at 35¢ to a

dollar on numerous newsstands. See Report of Capt. G. E. Matheny, Juv. Off. San Antonio, Texas, Police.

25. *Juvenile Delinquency.* A 14-year old boy on the north side was arrested for making obscene telephone calls. He admitted that he had called over 200 women and girls. He had in his home a huge manila envelope stuffed with filthy pictures. These he had traced from pictures in such magazines as "Sun Bathing", "Nudist", etc., because he had looked them over many times but did not have the money to buy them. He further admitted that while talking to the women he had the urge to hurt them. See Report of Capt. G. E. Matheny, Juv. Off. San Antonio, Texas, Police.

26. *Juvenile Delinquency.* Police picked up a 15-year old boy, who had written an extremely obscene and suggestive letter to a 13-year old girl, asking her to meet him near a northside elementary school. When arrested he had in his possession a deck of playing cards adorned with pictures of nude women. See report of Capt. G. E. Matheny, Juv. Off. San Antonio, Texas, Police.

Cases Derived From CDL Interviews With Police Officers in a City of 100,000.

1. *Rape.* Male youth, age, 20, forcibly attacks minor female age 12, on her way home from school. The victim reports (and the police find) a girlie magazine belonging to suspect left at the scene of the attack. See James case, April 3, 1963.

2. *Newspaper Route (1963—no arrest).* "We had a newspaper delivery route man. He ad a whole boxfull of lewd photos. He would show these to the little newspaper boys and then make a pass at them. There

wasn't enough evidence to go on him. His M. O. was to show these pictures to get the kids excited and then make a play for them. As I recall, we had two complaints on him, but we couldn't make him. He admitted to having the pictures but there wasn't the evidence to prove he showed or fondled them. Even though the boys said he showed them—their ages were such that they wouldn't go on him."

3. *Girlie Cutouts (1962—no arrest).* "One case comes to my mind and believe it or not, he was never caught. He was shook down on a couple of occasions, and he had these girlie magazines in his possession in the car. He had pieces of string tied around the wrist and cut them out and things like that. He had them cut in several places; and he had a penis inserted into one. He was in one of the market parking lots at the time. I brought him in and talked to him. He admitted that this was his doings. For a long time I had his name available. I always thought that he was involved or was going to be involved."

The magazines are in the police files. They are all of 1962 manufacture: Figure Annual 1962, Cuddle Bug, Vol. 300, No. 1, Black Lace 1962, Orbit L. N. Flirt, Vol. 1, No. 2. In each of the photographs the individual had cut slits in the vaginal and anal area and inserted human hair. It is interesting to note that this occurred just before the nudist magazines, showing pubic hair, came into being.

4. *Sex Perversion.* "We had a child molestation. The fellow was a projectionist. He would show lewd film and at the same time he was playing with these 5 and 6-year old girls. He copped out to the whole thing, but I lost it in court. The officer who was with

me didn't turn on the tape recorder. The defendant got up in court and denied the whole thing. About 5 years later his wife came in in tears. She found out that he was doing the same thing to his little nieces. He had told the whole thing to her, but she had gotten up in court and lied."

5. *Re: Lewd Telephone Calls:* "A guy will call up and say, 'I'm looking at some pictures, and I'm sure you look like this.' To take one case and say this happened in that case would not be possible."

6. *Re: Indecent Exposure and Peeping Toms.* "I do know that there have been occasions when we have had prowlers—peepers—they would have magazines in their cars and would frankly admit they were looking for excitement." The biggest thing we would have would be indecent exposure—then you would have your prowlers which could be broken down into two classes. I found the same thing with them. They had nude pictures and the magazines. It wasn't an uncommon thing and still it didn't happen each time. You thought not too much of it if they were there or they weren't there. There were numerous occasions you would find when you talked to them they had girlie magazines or photographs in their car."

7. *Indecent exposure.* "Two girls walked down a sidewalk near the suspect's place of business (commercial). He whistled at them. They looked up to see him standing inside the door. His fly was open and his privates were out with one hand on his privates and one beckoning to the girls. Defendant had pictures cut out of a nudist magazine, showing nude women in various poses, pinned up on a bulletin board. One of the victims saw the defendant remove

the photos as they were leaving. The children notified their parents who called the police. When the police arrived (20 minutes later) the pictures were no longer visible but were found by the police among some newspapers."

8. *Exhibiting Girlie Magazine Cutouts. (1966—no arrest).* "Two or three young girls, 12 and 13, were walking from school on the sidewalk. They observed a vehicle pull up into the driveway a short distance from them and in their path. A male exited from the vehicle and placed something on the sidewalk. He pulled out of the driveway and went down the street a short way. Upon reaching the spot the girls observed the subject matter to be nude pictures. They took them up to their mother who destroyed the pictures before reporting the case."

9. *Child Molestation.* "He had these lewd pictures at the Recreation Center. Some kid walked by and he conned him into coming into the bushes and forced him to masturbate. It was reported by the victim. This was the earlier case. At that time the suspect was about 13. Victim was also a young boy. In the more recent case (infra), it was a kidnap and oral copulation."

10. *Sex Perversion.* "A 50-year old man and an 8 and 11-year old girl were involved. The girls reported to the parents who reported to the police. The defendant came over with some lewd pictures and showed them to the girls. He worked for the family. He showed the pictures, had them pull down their pants and then they played games—ball in the pants, etc. He eventually committed 288 (oral copulation) on the children at their home."

11. *Exhibition Obscene Photos.* "A woman with a Youth Employment Agency had a daughter doing amateur modeling at a restaurant. The daughter passed by the suspect who stopped her and displayed a nude photograph and asked the daughter if this wasn't a picture of her. Another person was offered a drink and shown the same nude photograph."

12. *Sexual Perversion.* "A homosexual reported being assaulted with a deadly weapon. The event occurred on graduation night in June. Two boys were involved. One had worked in a restaurant where the suspect worked. The boys came over to his residence. The suspect had promised to take them to Disneyland to the graduation party but reneged. He gave them alcohol and showed them films. They boys had quite a bit to drink, got sleepy and went into the bedroom and he engaged in oral copulation. The boys cut off his hair and took the film. It was submitted but no complaint was filed. There was conflicting evidence —one of the boys might have been a homosexual."

13. *Exhibiting Obscene Photos.* "In the homosexual bars they show movies on the wall—male nudist type."

14. *Sex Perversion.* "A 17-year old boy had access to a vehicle. He picked up a 5-year and 7-year old boy and, after showing them a cutout from a nudist magazine behind a building, took them to a park. He copulated the 5-year old boy and forced the 7-year old boy to copulate him. He took them near their home. His record shows he had used a knife. He had a prior—he was excluded from Hawaii on the same activity."

15. *Sex Perversion.* "It was more than 10 years ago. Suspect lived alone. He got himself made Scout Master of the Sea Scouts and took young boys to his hotel. He would talk to them, then give them something to read. In the book it would say, 'Is this making you excited, are you getting a ....? Do you want me to ....?' He had all kinds of pictures of lewd acts, homosexual acts, etc. He was given psychiatric treatment."

16. *Sex Perversion—Suicide.* "The body was discovered by the wife of the suspect, who is 24 years old, when she came home from work as a social worker. He attended law school. She found him lying on the bed in a supine position, face down and naked. On top one end of a rope was tied to his ankles, and the other end was around his throat. A pair of white sox kept the rope from connection with his skin as did a towel around his throat. She screamed and the neighbor came in and cut the ropes. The Fire Department tried resuscitation and called the police. When the police arrived, his ankles were still trussed but rigor mortis had set in. Just above him on the bed were 5 or 6 nudist magazines (2 were Sun and Sport), all open to female forms. When he was moved, it was found he had a contraceptive on and had an emission on the bed. All windows, doors were locked. The neighbors had seen him enter, and he had no visitors until his wife came home. In the investigation with the Coroner's Office and County Sheriff disclosed a type of masochism—in which sexual excitement is reached upon tying oneself up and hanging to almost a point of blackout—substantiated by psychiatry and case histories. Interrogation of suspect's wife revealed that

ever since their marriage he was unable to obtain satisfactory intercourse without the use of ropes, being tied up and subjected to this before he could perform satisfactorily. He had received psychiatric help for 8 years. The death was accidental—he did not intend to do it. In this County, cases of this type occur about 6 times a year in which the defendant goes too far. He had sox on and a towel on his throat to prevent rope marks."

17. *Sex Perversion—Juvenile Delinquency.* "The defendant showed the victims pictures—nudist magazines and nude girls until he got them involved and participating in homosexual activity. He started with pictures of nude women and men and then afterwards just nude males. The story of the use of nudist magazines came from the two boys and other victims. The boys were in the 11, 12 and 14 age group. I came up with 14 victims myself and know there were many others. These were just those who admitted relationships with him and the ones I could identify. In each case the parents were surprised. He was active in the church choir. The boys called him Uncle Harry. The kids used his place as a hangout. They had young girls come over but defendant had nothing to do with them."

18. *Voyeurism.* "One time we got a call from the swim park. A man was seated in a car looking at the girls with binoculars. It was suspicious to the ticket woman who called the police. When we drove up he was driving away. He admitted to the M.O. but we let him go since nobody had seen him expose himself. He had a big jar of vaseline and would masturbate while watching the girls. He had several female type

hard type backs, pornographic books. Some fly-by-night was producing the material. They were the hard-back novel that you could buy in your magazine stores downtown."

19. *Sex Perversion.* "On one investigation we found a dress dummy in a garage with a hole cut in it. Evidently they would dress the dummy and use it for intercourse. We found a whole mess of girlie magazines at the same time in the garage."

Re: M.O. Card File. The City maintains a M.O. card file that goes back 5 years. The following M. O.'s were found under the general title "Sex Crimes."

20. Suspect told the young boy, "Come up to my room and look at some of the magazines." The juvenile reported the matter to the police who searched the room and found one book and two magazines.

21. The suspect "shows pictures of nudes".

22. A 21-year old female reported receiving lewd photographs in the mail. She believed that a 24-year old male whom she had stopped seeing had sent the materials out of spite.

23. An automobile drove up to the driveway of a home and left photographs of a penis on the driveway. The victims are believed to be two minors, ages 10 and 12, living in the residence.

24. A man in a car left nude pictures on the sidewalk.

25. A male approached a 9-year old juvenile in the public restroom saying, "See this" and "Have you ever seen your mother in the nude?" and shows black and white photographs of nudes.

Cases Derived From CDL Interviews With Police Officers in a City of 65,000.

1. *Sex Perversion.* Officer in investigating at about 5:40 P.M. came upon two youths, 15 and 16 years of age, engaged in an act of sodomy. The officer stated. "At the time I came upon these kids, there was a Playboy magazine opened to a double-paged spread of nude female photos. The boy that was acting as the passive partner had his head propped up, with his hands resting on his elbows with the magazine spread out before him. The active partner while on top was looking at the same magazine over his friend's shoulder. One of the youths had taken the magazine from the drawer of his older brother's dresser, and both had been reading it prior to the act."

2. *Indecent Exposure.* Informant, parked at a chain store parking lot, was waiting for his wife and noticed the suspect in a vehicle who was looking at the women as they passed and appeared to be masturbating. He called a police officer. "As the officer approached suspect he was observed holding and apparently reading a pocket book 'All About Annette' (Sex Stories Pocketbook). As the suspect turned toward the officer a black suit coat was observed lying on the suspect's legs, the fly to suspect's trousers was unzipped, partially exposing the suspect's penis. The suspect had another sex pocketbook lying on the front seat, 'As Bad as They Come', which he grabbed and attempted to put underneath the front seat of the described vehicle. . . . Suspect admitted he was masturbating while he was watching the women that were wearing shorts walking through the parking lot and into the chain store at that location. He also stated

that he had been reading the sex pocketbooks as this occurred and that this would 'excite him'."

3. *Indecent Exposure.* A male 36 exposed himself on 7 different occasions in a 2-day period to girls 8 to 12 in the vicinity of a school and a playground area. On one occasion the following occurred: "Females, ages 6 and 13, remained playing in the park at location for approximately 15 minutes when the suspect called them over to his vehicle which was parked at the west parking lot. Upon approaching the vehicle the victims stated that suspect was outside his vehicle in a stopped position with his trouser fly open and his penis protruding. Suspect then gave the victims a book, which is held in evidence, asking if the victims would read it for him. While the victims looked at the book, the suspect began masturbating. Victims stated they looked at the first page of the comic book and at the suspect and then ran away from the suspect, throwing the book down as they fled. At that time the police unit arrived at the location."

4. *Exhibits Obscene Cards.* A juvenile aged 15 exhibited 5 playing cards all with indecent photographs to a 12-year old. Upon investigation, it was revealed that he had received them from a 16-year old and that many of his friends had similar playing cards in their possession, but that he did not know where they got them.

5. "There was a County Sheriff's Office case that occurred just north of the city limits a couple of years ago. A man was cohabitating with a woman who had a 10-year old daughter. The woman worked during the day while the man stayed home with the daughter. The man had in his possession numerous catalogs from a

firm named 'Nutrix' that was located in New Jersey. The catalogs were labeled, 'Special Bondage Issue' and showed samples of photographs that could be purchased in sets illustrating females in various flagellistic as well as other algolagnic poses. Apparently the pictures excited him to the point that he began to act them out with the young daughter. He began by making her strip and do housework in the nude. While the girl was working around the house he would strap her bare bottom as the tendency struck him. Later, he suspended the nude girl by her ankles from the rafters in the garage and committed an act of cunnilingus upon her."

7. "Another case that occurred a few years ago concerned a barber. He used girlie magazines on his youthful teenage customers and when they were inflamed he would commit an act of fellatio upon them. He was never prosecuted for this due to the fact that we were unable to convince a victim's parents to allow the kids to testify. The barber was arrested for a violation of plain drunk and while he was in custody, I questioned him about the alleged acts and he stated that they were in fact true."

8. "There were other cases there too involving the use of hard core pornography—one case (a breach of peace) where this guy was mad at his neighbor, so he dropped dirty pictures on the sidewalk and his lawn so that his kids could see them."

9. There was that knucklehead who was taking the pictures for Fizeek and Trim. We pinched him on a check warrant. In his possession he had a whole bunch of homosexual stuff—hardcore—some Mickey Mouse movies and also some Trim, View, and Fizeek magazines. Supposedly he was a photographer. He was

taking pictures of kids to submit them to these magazines. He had form letters which he would send to his models to get the kids to pose with questions such as, 'What grade are you in?' 'Do you pose in the nude?' etc. He had a kid in college who wrote him that there was a great market for that stuff in the area —that the kids would go nuts about it."